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No. 669

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

THE KLIX CORPORATION,
Petitioner,

v.

CABLE VISION, INC. AND IDAHO MICROWAVE, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals, Ninth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion and supplemental opinion of the District Court (App. A of Petition) are reported at 211 F. Supp. 47. The opinion of the Court of Appeals for the Ninth Circuit (App. B of Petition) is reported at 335 F. 2nd 348.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

The district court had ruled, applying Idaho law, that the Respondent, by maintaining an antenna and associated equipment enabling its subscribers to receive certain television programs, tortiously interferred with contractual relations between the Petitioner and program suppliers and competed unfairly. The circuit court reversed, ruling that the decisions of this court in *Sears, Roebuck & Co.* v. *Stiffel Co.*[1] and *Compco Corp.* v. *Day-Brite Lighting, Inc.*[2] were dispositive. The judgment of the district court was vacated with instructions to permit Petitioner to amend its counterclaim to demonstrate a protectible interest under statutory or common law copyright, if it is able.

1. Can the licensee of the right to broadcast a television program secure independent rights under state law so as to prevent the reception by subscribers to a community antenna of the same program as broadcast by another licensee whether or not the program has secured or can secure statutory copyright protection or common law copyright protection within the scope of § 2 of the Copyright Act?

2. Is television reception a subject of uniform national regulation so as to preclude a state common law injunction that would result in diverse regulation?

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[1] 376 U.S. 225.

[2] 376 U.S. 234.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Constitution of the United States (Article I, Section 8) and the statutes involved (17 U.S.C. §§ 1, 2 and 101) are set forth in the petition at pp. 3-5. Additionally a constitutional provision involved is:

> "This constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (Article VI, Clause 2).

STATEMENT

This case concerns the right of the public to receive television broadcasts and the right of suppliers to furnish the antenna equipment necessary for reception. Petitioner, the KLIX Corporation (hereafter "KLIX"), owns and operates the only television station in Twin Falls, Idaho. Respondents are Cable Vision, Inc., the operator of a community television antenna[3] in Twin Falls, Idaho and Idaho Microwave, Inc., the operator of a communications common carrier microwave relay system, licensed by the Federal Communications Commission, which furnishes service to the community antenna. Both Respondents are

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[3] Community antenna systems are analogous to apartment house or hotel master antennas. Community antennas are described in detail in the appendix to the brief of Appellants in the Court of Appeals. As found in Intermountain Broadcasting & Television Corp. v. Idaho Microwave, Inc., 196 F. Supp. 315 (D.I. 1961) (appendix) with reference to the Respondents' activities, Cable Vision does nothing which the subscribers could not lawfully do for themselves.

hereafter referred to as "Cable Vision". The residents of Twin Falls who desire a choice of television stations require roof top or backyard receiving antennas. Many people have erected their own. Others have subscribed to Cable Vision's service, which substitutes for many separate installations a single set of antennas and cables connecting it to the subscribers' own television sets. The programs received by use of either kind of antenna equipment are in large part the same and include part of the programs broadcast by KLIX.[4] Television programs consist of films, video tape recordings or broadcasts depicting performances or events.

The original complaint filed by Respondent alleged that KLIX, the licensee and owner of Television Station KLIX-TV in Twin Falls, has attempted to monopolize, in combination with other persons, television in Twin Falls and elsewhere. KLIX filed a counterclaim alleging that KLIX had exclusive licenses to broadcast certain programs in Twin Falls; and that Cable Vision, by enabling their subscribers to receive these programs as broadcast simultaneously or earlier by other stations was unfairly competing and interfering with KLIX's contractual rights. Only the counterclaim is now before this court.

KLIX has conceded that it has no right to interfere with special antennas, owned by the individual residents of Twin Falls, enabling reception of the identical programs as the community antenna.[5] It was found and con-

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[4] Appendix C to the brief of Appellants below showed types of equipment available for home installation. Appendix E to the brief of Appellants below consisted of tables showing program overlap, that is, the broadcast of the same program by several stations receivable in Twin Falls.

[5] This concession applied even when a number of people living in different houses share an installation. Intermountain Broadcasting & Television Corp. v. Idaho Microwave, Inc., 196 F. Supp. 315, 327 (D.I. 1961).

ceded that the community antenna does not originate programs or alter the programs received; that there is no misrepresentation; and that Respondents have not interferred with KLIX's contracts in any way (except by maintaining the community antenna).

On KLIX's motion for preliminary injunction, the district court held that under the law of Idaho (which has no relevant precedents), the furnishing of the antenna equipment service constituted unfair competition and unlawful interference. This conclusion rested on the trial court's analogizing the equipment service to the activities found to infringe copyright in *Buck* v. *Jewell LaSalle Realty Co.*[6] The trial court characterized the community antenna's activities as "reproducing" programs. The programs in question are within the ambit of copyright, whether or not specific programs are copyrighted or copyrightable. Yet the action is not for infringement, nor are the copyright proprietors before the court. Nevertheless, an injunction issued,[7] restraining Cable Vision from operating its equipment so as to enable subscribers to receive broadcasts of programs by stations other than KLIX simultaneously with or earlier than KLIX's broadcast of the same programs, provided only that KLIX had acquired the contractual right to broadcast the programs first in Twin Falls. The court found that KLIX did not oppose Cable Vision's reception of KLIX's broadcasts.

The trial court had previously held, in a related case,[8] that the stations (other than KLIX) whose broadcasts were being received by Cable Vision's subscribers had no right to prevent such reception. Thus the injunction would have given KLIX the right to prevent Cable Vision from

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[6] 283 U.S. 191.

[7] Suspended by the district court pending appeal.

[8] Intermountain Broadcasting & Television Corp v. Idaho Microwave, Inc., 196 F. Supp. 315 (D.I. 1961) (appendix).

providing antenna service relative to program broadcasts the same court had previously held free for public reception by the same subscribers using the same equipment. Moreover, the court could not limit the use of the hundreds of separate antenna installations in Twin Falls being used to receive the same programs. The injunction therefore imposed a discriminatory system dependent wholly on state law yet affecting both the copyright policy and the communications policy, in which uniformity is fundamental.

Treating the trial court's decision as an attempt to redeem copyright interests by state law theories, the court of appeals reversed. The court held that Petitioner is free to commence another counterclaim under common law or statutory copyright, if it can. If Respondents do not infringe (as they maintain), then their activities are a lawful use of the public domain. Meeting in the counterclaim an intended circumvention of the copyright policy, the court of appeals has applied the *Sears* doctrine to prevent the encroachment on the public domain and to preserve uniformity.

ARGUMENT

The issue here presented is one recently unanimously decided by this Court, in *Sears, Roebuck & Co.* v. *Stiffel Co.*[9] and *Compco Corp* v. *Day-Brite Lighting, Inc.*[10] The court below stated that those decisions were dispositive of this case.[11]

The counterclaim arose as a pure state law matter, as both courts below held and the parties concede. In the absence of any conduct which could substantiate a separa-

[9] 376 U.S. 225.

[10] 376 U.S. 234.

[11] 335 F. 2d 348, 351.

ble tort, the trial court recognized independent rights in a licensee of the right to broadcast television programs, works plainly within the ambit of Article I, Section 8, Clause 8 of the Constitution,[12] to prevent reception of broadcasts of the same programs made by other licensees. The protection was given to one not the proprietor of copyright. A more thorough violation of the copyright policy could not be imagined.

Statutory copyright subsists in many of the programs. It is elementary that in these programs there are no rights to control use except the rights granted the proprietor by the statute. All other benefits to be derived from the works are in the public domain.[13] The granting of any protection as a matter of state law is contrary to the Copyright Act and the Constitution.

As to those programs in which statutory copyright does not subsist, the result is the same, whether they are copyrightable or not. If common law rights consistent with Section 2 of the Act and the Constitutional provision can be asserted, KLIX is free to do so, but it has not. In no event can any collateral protection be granted as a matter of state law because it would be inconsistent with the copyright system.[14]

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[12] Respondents deny infringing any copyright, an issue not before the court. Reception, which the trial court characterized as "reproduction", is a kind of conduct related solely to the use or enjoyment of the programs. The right to control such conduct would be an extension of the copyright monopoly.

[13] Sears, Roebuck & Co. v. Stiffel, supra.; Loew's Inc. v. Superior Court, 18 Cal. 2d 419 (1941); White-Smith v. Apollo, 209 U.S. 1 (1908); Corcoran v. Montgomery Ward & Co., 121 F. 2d 572 (9th Cir. 1941); Cheney Bros. v. Doris Silk Corp., 35 F. 2d 279 (2d Cir. 1929), cert. den. 281 U.S. 728.

[14] Field v. True Comics, 89 N.Y.S. 2d 35 (1949); Miller v. Goody, 139 F. Supp. 176 (S.D.N.Y., 1956), mod. sub. nom. Shapiro Bernstein v. Goody, 248 F. 2d 260 (2d Cir. 1957); R.C.A. Mfg. Co. v. Whiteman, 114 F. 2d 86 (2d Cir. 1940).

The trial court granted to a bare licensee of the right to broadcast the programs rights amounting to an unlimited clearance.[15] The rights so recognized were by definition over and above what the copyright proprietor had. In the trial court's reasoning, KLIX was not asserting the rights of the program proprietors but independent rights. This is emphasized by the fact that the same court had recognized Cable Vision's right, as against the operating broadcasters, to receive these same programs.[16] The trial court simply carved these special rights out of the public domain, severely limiting the right of residents of Twin Falls to receive broadcasts.

Consequently, whether the programs are copyrighted, copyrightable, or uncopyrightable, the case is squarely within this Court's *Sears* and *Compco* rulings. Since the court of appeals applied those rulings as dispositive, there is no occasion for further review.

I. The Decision Below Correctly Applies the *Sears* Doctrine

This Court decided in *Sears* and *Compco* that the copying of an unpatented design could not be unfair competition in the absence of misrepresentation. This holding was founded on the traditional interpretation of Article 1, Section 8, Clause 8 of the Constitution. That is, the limited patent and copyright monopolies are granted for the public benefit; those benefits to be derived from a work which are not granted to the author are in the public domain; state action limiting the public domain must be struck down as contravening the federal policy. Uniformity is an essential condition of the system.

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[15] Cf. U.S. v. Paramount, 334 U.S. 134. It was urged below that if the license contracts were so interpreted there was a misuse of copyrights.

[16] Intermountain Broadcasting & Television Corp. v. Idaho Microwave, Inc., supra. (appendix)

> "Thus the patent system is one in which uniform federal standards are carefully used to provide invention while at the same time preserving free competition." [17]
>
> "The effect of the clause and the statutes enacted under it is to allow free access to copy whatever the federal patent and copyright laws leave in the public domain." [18]

The decision of the circuit court carries out the *Sears* doctrine and is clearly correct. The case involves only matter within the ambit of copyright and acts equally within that ambit. No situation more plainly shows the need for uniformity or the futility of seeking to regulate intellectual property by state law than this case, wherein the trial court sought to enjoin reception of broadcasts which it previously held Cable Vision has a right to receive.

KLJX is aggrieved by the fact that programs reach subscribers from a source other than Station KLIX-TV. That the programs themselves are not some unique entity but plain, copyrightable works or works within the ambit of copyright is shown by the fact that copyright subsists in the bulk of them. Programs are largely films or videotapes, both acceptable as "copies" for deposit under Section 10 or Section 12 of the Copyright Act. Some programs are broadcast depictions of events or performances and are ephemeral unless video tapes or films of them are made (as is often the case). Petitioner now argues that there may be uncopyrightable programs in which rights may be recognized under state law. This would bluntly contradict the *Sears* doctrine.

Further, Cable Vision's acts were characterized by the trial court as "reproducing" programs. The right to con-

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[17] Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 231.

[18] Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234, 237

trol "reproduction" can exist only under copyright. As *Sears* makes plain, the states are not precluded from dealing with tortious conduct merely because intellectual property is involved. There must, however, be a separable tort, such as misrepresentation. The states are precluded from interferring in the use or enjoyment of intellectual property except to the extent permissible under the Constitution and Section 2 of the Copyright Act. No facts establishing a separable tort were proved.

The court of appeals disposed of the assertion that Respondents' activities interfere with contractual relations on the ground that a new right in programs cannot be created by contract:

> "To allow these appellees relief on an alternate ground not substantially differing in gravamen from other relief foreclosed in operative effect by the Supreme Court's explicit holding would be to enshrine form at the expense of substance."[19]

KLIX suggests that these matters were raised for the first time on appeal. This is wholly incorrect. These issues were fully briefed and argued to the trial court, which disposed of them in one sentence.[20] Since the claim was not for infringement but only for collateral state law rights, Cable Vision was not obligated to put the copyrights of the programs in issue any more than KLIX pleaded those copyrights. KLIX sought to prove contracts under which it claimed to acquire rights in programs and Cable Vision denied that those contracts would support the claim. The validity of copyright in particular programs was never in issue; only that all possible rights in the programs were governed by copyright, not the law of Idaho.

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[19] 335 F. 2d 348, 351-352.

[20] 211 F. Supp. 47, 58.

Petitioner appears to have wholly misunderstood the court of appeals and *Sears*. The argument is now raised that, although no rights can be claimed in a program the copyright in which has expired, other rights beyond the scope of copyright can be claimed in copyrighted programs and even uncopyrightable programs.

If the work is copyrighted no rights to prevent use alone can exist except those under the Act. The assertion of rights in works the copyright in which has expired is plainly unwarranted, *Brulotte* v. *Thys Co.*[21] But Petitioner fails to recognize that duration is only one of many measures of the rights of an author. All uses of a work, all benefits to be derived from it, belong to the public except those explicitly granted by the statute.[22] Consequently, the right to control broadcast reception of programs cannot exist as a matter of state law any more than the right to extend life of an expired copyright.

Similarly, the limitation of copyright to works possessing a minimum of creative content does not leave the states free to grant monopolies in works failing to meet the standard. This limitation is, similarly, only one of several delineating the subject matter of copyright. It is well settled by *Sears* and *Compco* that uncopyrightable matter of considerable value and creativity cannot be protected against use by state action.[23]

Petitioner misconstrues such cases as *Pittsburgh Athletic Co.* v. *KVQ Broadcasting Co.*[24] in which the defendant caused a program to be produced from a privately controlled event. Whether the event is copyrightable or not or in the ambit of copyright or not, a program depict-

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[21] 143 U.S.P.Q. 264 (U.S. Nov. 16, 1964).

[22] Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225.

[23] See cases cited at note 13, supra.

[24] 24 F. Supp. 490 (W.D.Pa. 1938).

ing the event falls in that ambit. Respondents do not make programs of events. Their equipment is used to receive some programs depicting events. If these programs are not copyrightable, they are in the public domain. Even if the states are free to protect the event, they are not free to protect the programs (subject only to the Constitution and Section 2 of the Copyright Act).

As to those programs which are unpublished and uncopyrighted, the failure to secure statutory copyright may leave common law copyright available. The point was explicitly made by the court of appeals and this Court in *Sears*. But that issue is not now before the Court with respect to any program. The recognition of common law rights within the scope of Section 2 would still bar application of such purely collateral state rights as KLIX seeks to assert.[25]

The court of appeals at no point exceeds *Sears* and *Compco*. The decision does not rest on any implicit conclusion that copyright in the programs has been lost or that any new limitations on protection have been formulated. The court of appeals has simply followed this Court in enunciating well established doctrine.

II. There is No Conflict of Decision

The court of appeals correctly followed *Sears* and *Compco*. These decisions have clarified the possible scope of application of the misappropriation doctrine enunciated in *INS* v. *AP*[26] as federal common law. The apparent conflicts in application of that doctrine are, therefore, no

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[25] The simultaneous publication of the program by its owner and use by respondent would not necessarily affect the ability to secure copyright, see e.g. Public Affairs Press v. Rickover, 177 F. Supp. 607, rev. 284 F. 2d 262, vac. 369 U.S. 111, or the availability of special rights.

[26] International News Service v. Associated Press, 248 U.S. 215.

longer relevant. These apparent conflicts did not persuade this Court to review even before *Sears* and *Compco*.

Further, as in most cases refusing to apply *INS* v. *AP*, ample grounds of factual distinction are found here. The court of appeals mentions three and refers to others set forth in *Intermountain*.[27] That case involved essentially the same facts and parties and was heard, on motion for summary judgment, by the same judge. In *Intermountain*[28] he refused to enjoin the same community antenna from receiving the same programs here involved. The difference was that the plaintiffs in *Intermountain*[29] were the broadcasters of the programs (one of which had common ownership with KLIX). In other words, Cable Vision established in *Intermountain*[30] the right to receive the very broadcasts which the same trial judge sought to enjoin their receiving in this case. In light of these factual complexities a conflict of decision can hardly be perceived.

Petitioner seeks to make a conflict from the Ninth Circuit's reliance on *RCA Mfg. Co.* v. *Whiteman*[31] rather than *Capital Records* v. *Mercury Records*.[32] In light of *Sears*, this reliance appears wholly correct; and Judge Hand's dissent in *Capitol Records*[33] would appear to express the law correctly as well.

It is obviously unnecessary to overrule *INS V. AP* to sustain the Ninth Circuit. This Court did not deem such action necessary in *Sears* or *Compco*. The majority in *INS* relied on a number of particular circumstances

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[27] 196 F. Supp. 315 (appendix)

[28] Ibid

[29] Ibid

[30] Ibid

[31] 114 F. 2d 86, cert. den. 311 U.S. 712.

[32] 221 F. 2d 657 (2d Cir. 1955)

[33] Id at 664

which have been found not to exist here. The theory of reverse passing off, on which the concurrence of Mr. Justice Holmes rests, is entirely inapplicable here. Plainly, on the question of *INS* v. *AP* there is no conflict.

In essence, the *Sears* and *Compco* decisions have swept away a number of confusing precedents on which KLIX has relied. No conflict to justify this Court's hearing the case can be manufactured from the possible inconsistencies between the Ninth Circuit's following *Sears* and older decisions of other courts.

III. Reception is a Subject of Uniform National Regulation

Both the trial court and the circuit court ruled that the common law injunctive relief sought was not precluded by the Communications Act of 1934. The relief sought by KLIX would interfere with or block the reception of television signals. Television signals broadcast are *per se* in interstate commerce.[34] They freely and frequently are received by the public in a state other than that from which they were broadcast. This reception is part of a uniform national scheme of regulation designed to provide the public with free television.[35] An injunction issued under state common law doctrine which blocks the reception of signals places private contractual rights over the public right to receive. Moreover it creates diverse regulations in a field of commerce which demands uniform national regulation.[36] Thus in light of the silence of Congress such common law relief must be precluded.

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[34] Allen B. Dumont Laboratories v. Carroll, 184 F. 2d 153 (3rd Cir. 1950).

[35] Federal Communications Act of 1934, 47 U.S.C., ch. 5, § 151.

[36] Campbell v. Hussey, 368 U.S. 297 (1961); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1946); Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1941); Napier v. Atlantic Coastline, 297 U.S. 605, 613 (1929); cf. Standard Radio and Television Co. v. Chronicle Publishing Co., 6 Cal. Rept. 219, 182 Cal. App. 2d 293 (1960).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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